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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 449

JOHN MICHAEL PETRONE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

J. VINCENT KEOGH,
ANTHONY A. CALANDRA,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 449

JOHN MICHAEL PETRONE,

vs. *Petitioner,*

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 20th, 1950, which affirmed the judgment of conviction of the United States District Court for the Southern District of New York, for possession of counterfeit money.

Opinion Below

The opinion by the United States Court of Appeals for the Second Circuit is found in R. 34-37.

Jurisdiction

The judgment of the Court of Appeals was entered on November 20th, 1950. The jurisdiction of this Honorable Court is invoked by virtue of Title 28 U. S. C. A. Sec. 1254.

Questions Presented

1. Whether there is a conflict in the decisions of the United States Court of Appeals for the Second Circuit, Third Circuit, Fourth Circuit, and other Circuit Courts of Appeals.

2. Whether, from the mere naked possession of counterfeit money, without more, can there be a legitimate inference of an intent to defraud to the exclusion of any other consistent hypothesis as to lack of intent to defraud.

3. Whether it is the duty of the petitioner to prove his innocence of the crime charged.

4. Whether it was error for the trial court to refuse to permit a witness to testify as to the impression given from the course of conduct of the accused at the time the crime was committed.

5. Whether the elements constituting the crime charged were proven.

Statement

Petitioner, John Michael Petrone was indicted for unlawfully, willfully, and knowingly and with intent to defraud, keep in his possession and conceal 500 counterfeit obligations of the United States in denominations of $10.00 in violation of Title 18 U. S. C. A. Sec. 472.

Petitioner waived trial by jury and was tried before the Honorable Gregory F. Noonan, Judge of the United States District Court for the Southern District of New York.

Petitioner submitted no evidence in his own behalf.

He was found guilty and sentenced to a term of fifteen years imprisonment and to pay a fine of $5000.00.

Petitioner with his wife and son reside at 1807 Seminole Avenue, Bronx, New York. The premises was part of a three unit structure containing three one family houses (R. p. 5). On March 24, 1950, Agents of the Federal Bureau

of Investigation went to petitioner's home about 8 o'clock in the morning (R. p. 4). Agent Sullivan testified that he had gone to petitioner's home for the purpose of serving a warrant upon an indictment charging petitioner with receiving stolen property and that said warrant had nothing to do with counterfeiting (R. p. 5 and 9). That when agents Sullivan, Handley and MacLennan rang the doorbell and after some minutes had elapsed that the petitioner put his head out of the window (R. p. 10) and this was at approximately 8:20 A. M. in the morning. That petitioner inquired who they were (meaning agents) and they identified themselves as special agents of the Federal Bureau of Investigation and that they informed petitioner that they had a warrant for him and showed petitioner the warrant (R. p. 10). That petitioner subsequently opened the door and admitted the agents to his home (R. p. 11) after a lapse of 20 minutes (R. p. 19).

Agent Sullivan further testified that the petitioner was dressed, at the time, in pajamas and a robe, that his hair was tousled and he did not seem to be washed (R. p. 11). That after the agents were admitted, Agent Sullivan had a conversation with petitioner relating to the stolen jewelry as charged in the warrant (R. p. 11). Agent Sullivan accompanied petitioner to the bedroom on the third floor so that petitioner could dress. There were three bedrooms on this floor (R. p. 11), one of the bedrooms was occupied by petitioner, a middle bedroom by his son and a third bedroom was seemingly unoccupied (R. p. 12). Prior to going up to the bedroom agent Sullivan informed petitioner they had a right to search the premises and petitioner gave him his permission and stated they the agents would not find anything anyway (R. p. 6).

Agent Sullivan searched petitioner's own bedroom and did not search the son's bedroom because the latter was

sleeping and petitioner did not want his son to know what was going on (R. p. 6). The agent went to the third bedroom and on top of the dresser noticed a quantity of currency but said nothing about it (R. p. 6). This agent searched a chest of drawers which petitioner's wife had told him contained shirts belonging to petitioner (R. p. 7). This same bedroom contained clothing belonging to the son and there may have been articles of women's clothing in this same room (R. p. 14, 15). Agent Sullivan, then testified, as follows:

(R. p. 7):

> "The witness: After completing the search of this chest of drawers I turned to the dresser where the currency lay, and *I picked up a bundle of it and turned to Petrone and asked him what this was. He replied he did not know.*" (Italics supplied).

Agent Sullivan called Agents Handley and MacLennan who were downstairs, and asked them to join him. He testified that petitioner was "disgusted with himself * * * that he had been legitimate and this thing would ruin him completely * * * that it was a serious matter judging by the articles he had been reading in newspapers about counterfeiting cases * * * he was going to kill himself (R. p. 8). Petitioner further allegedly said "cannot we do something about this."

On cross-examination on this line of questioning Agent Sullivan testified that the currency in question was not concealed but open to plain view (R. p. 14). That in the bedroom in which this currency was found there was some of petitioner's clothing therein. This particular bedroom had formerly been that of petitioner's daughter and had been unoccupied since she had left it (R. p. 16). Agent Sullivan on cross-examination when asked about the cur-

rency which he had seen on top of the dresser was asked the following questions and answered as follows:

(R. p. 16, 17):

"Q. But after completing your search of this chest of drawers you went to the dresser and you picked up these bills? A. I picked up one bundle.

Q. Where was Petrone at that time? A. He was in the room.

Q. Near the door? A. Yes, in relation to me he was closer to the door.

Q. How many feet away was he from you? A. Four or five.

Q. When you saw the bills there and you picked out one bundle what did you say to Petrone? A. 'What is this?'

Q. And Mr. Petrone said what? A. 'I don't know.'

Q. What if anything did you say beyond that? A. His next comment was——

Q. No, I asked you what you said after that? A. My next move was to call my fellow agents to join me.

Q. You said nothing beyond that 'What is this?'

A. No, I did not.

Q. Are you sure of that? A. I will take that back, I did say 'It is counterfeit isn't it.'"

(R. p. 11):

"Q. That is it. So before you called the agents and before Petrone said anything to you at all beyond 'I don't know what it is,' you then said to him 'This is counterfeit, isn't it?' Is that right? A. Yes."

Agent Sullivan was asked the following and answered viz:

(R. p. 18):

"Q. One of the statements, as I copied it, was that he said something about that rat brought the stuff, that he did not know that the rat brought the stuff in

last night, is that what he said? A. No, he said 'That rat brought the stuff last night.'

Q. You asked him whether he was going to burn it, or one of the Agents asked him whether he was going to burn it? A. Yes, he did.

Q. And what did Petrone say to that? A. He said, 'No, I do not intend to pass it in New York.'

Q. *And he did not say he intended to pass it anywhere, did he?* A. *No.*"

Agent MacLennan testified that he placed the petitioner under arrest on the warrant which they had gone to execute and that after a lapse of half hour or forty minutes after they went inside of petitioner's house that he and Agent Handley were summoned upstairs by Agent Sullivan and that Agent Sullivan handed to him a package of the currency and said "It looks like counterfeit" (R. p. 20). That in all there were 510 bills each in the denomination of $10.00. This witness testified that petitioner was using quite profane language and said that he was finished and ruined and was sorry for the shame brought upon his wife and for the use of profane language and further that petitioner allegedly stated that he brought it home last night (R. p. 21). That thereupon they all adjourned to the second floor and all of the rooms were searched by the agents. And during the course of conversation the petitioner stated (R. p. 21):

"Q. Tell the Court what he said? A. We went in the kitchen of Petrone's house, and Mrs. Petrone was there and Mr. Petrone, and before we finally left I believe the son got dressed and came down. There was a conversation while we were seated in the kitchen concerning the bills. Mr. Petrone turned to his wife and I believe she had asked him what was going to happen to him or 'what are they going to do to you?' and he said, 'Well, they are going to ask me a lot of questions; they are going to ask where I got this stuff.' And he said, 'John Petrone is no stool pigeon.'"

Agent MacLennan further testified (R. p. 28):

> "I recall that Agent Handley asked him what he was going to do with the money, and Petrone hesitated for a few seconds and did not give any answer; and then Agent Handley said, 'Well, you were not going to light the fire with it. I recall Petrone said something to the effect that this was not 'My line. I have for months now, I have been working hard, trying to promote the sales of a drug,' that he told me was a sure cure for ulcers, and he said, 'To think to get into this thing.'
>
> Q. Did he say anything further with reference to what was going to be done with the money? A. I do not specifically recall the conversation. I think that there was a conversation about it, but I frankly do not recall it at this time."

Agent James F. Handley's testimony added practically nothing to that of Agents Sullivan and MacLennan; we will point out in our Argument that he did not corroborate his brother agents on certain testimony given by said agents.

John A. Kett, a member of the United States Secret Service testified as an expert and stated that the currency found in the Petrone residence by Agent Sullivan was in fact counterfeit.

Petitioner, John Michael Petrone, did not testify in his own behalf and called no witnesses. At the end of the government's case, he moved for a dismissal of the indictment (R. p. 29) and after its refusal an exception to said ruling was noted, rested (R. p. 30). Petitioner moved for his acquittal and this motion was likewise denied by the learned trial court, to which ruling petitioner noted an exception (R. p. 31).

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that from mere possession of counterfeit money an intent to defraud immediately follows.

2. In failing to hold that an intent to defraud must be proven as an essential element of the crime of possession of counterfeit money in violation of the statute.

3. In holding that petitioner was required to explain the presence of counterfeit money in his home without his knowledge.

4. In holding that certain exclamations by petitioner were incriminating and not consistent with innocence.

5. In holding that while it was error for the trial court to refuse to permit a witness to testify on cross-examination as to such witness' impression from the attitude, conduct and declarations of the petitioner, that nevertheless the judgment of conviction should be affirmed.

6. In affirming the judgment of conviction in the district court.

Reasons for Granting the Writ

1. The decision of the court below is in conflict with *U. S.* v. *Carll*, 105 U. S. 611; *U. S.* v. *Clyatt*, 197 U. S. 207; *Gallagher* v. *U. S.*, 144 Fed. (2) 287 (CCA 1); *Zottarelli* v. *U. S.*, 20 Fed. (2) 795 (6 CCA); *Matchok* v. *U. S.*, 50 Fed. (2) 266 (CCA 3); *Price* v. *U. S.*, 70 Fed. (2) 467 (CCA 4); *U. S.* v. *Ruffino*, 67 Fed. (2) 440 (CCA 2); and *U. S.* v. *Litberg*, 175 Fed. (2) 20 (CCA 7). These decisions expressly hold that it is the duty and requirement of the government to prove that in the crime of possession of counterfeit money each of the following elements constituting the crime must be proven, (1) knowledge of the counterfeit character of the money (2) possession and (3) intent to defraud. These decisions further establish that

none of the elements may be presumed but must be proven by substantial evidence. In the decision at bar, the appeals court held (R. p. 35) . . . "Furthermore, once we *suppose* that Petrone was in possession of the money, his intent to use it fraudulently follows." This holding is clearly in conflict with the holdings of the Supreme Court of the United States and appellate courts of other circuits, *supra*. For, there must be some definite, positive, unequivocal evidence of some overt act or undisputed admission by an accused to establish the element of intent. The statute, Title 18 U.S.C.A. Section 472 (R. p. 8) defines the crime "Whoever with *intent to defraud* . . . keeps in possession or conceals . . . counterfeited . . . of the United States, definitely establishes as a prerequisite proof of "intent to defraud." The decision below by supposition, suspicions, and speculations concludes "Furthermore, once we *suppose*" because suppositions lead us into the realms of speculation, guess and surmise and no conviction could be permitted to stand under such circumstances, *De Vito* v. *U. S.*, 68 Fed. (2) 837 (CCA 2); *Girgenti* v. *U. S.*, 81 Fed. (2) 741 (CCA 3). Petitioner denied knowledge of the money, their spurious character or *any* intention to pass them anywhere (R. p. 18).

Failure of the government to prove the elements of knowledge and intent to defraud in a prosecution for possession of counterfeit money except by circumstances inconsistent with innocence will not support a conviction, *Romano* v. *U. S.*, 9 Fed. (2) 522 (CCA 2); *U. S.* v. *Laffman*, 152 Fed. (2) 393, 394 (CCA 3); *U. S.* v. *Russo*, 123 Fed. (2) 420, 423 and others. Furthermore, inferences which arise from circumstances cannot be substituted for facts to prove guilt, *Gerson* v. *U. S.*, 25 Fed. (2) 49; *Cooper* v. *U. S.*, 9 Fed. (2) 216; *Keen* v. *U. S.*, 11 Fed. (2) 260, and others.

2. The opinion at bar hold (R. p. 35). . . . "Petrone

does not suggest any tenable explanation for the presence of the bills in his house without his knowledge", . . . "Petrone gave no explanation of what he meant to do with them except that he did not mean to pass them in New York or Canada, which at least suggested that he planned to pass them elsewhere." Petrone did not say he intended to do anything with the bills and that he did not intend to pass them anywhere. The appeals court, again, is supposing and guessing, and this inference is unwarranted when we visualize everything which transpired on the day of the offense . . . Petitioner consented to a search of his home . . . the bills were in plain open view on a dresser . . . he wanted to kill himself . . . it was not his line," are all declarations directly pointing to circumstances consistent with innocence and inconsistent with guilt. He kept the agents waiting twenty minutes before admitting them to his home. If he knew the counterfeits were in his home, if he knew monies were counterfeits . . . if he knew anything about these monies . . . he would and could have easily disposed of them in some manner during the long time he kept the agents waiting.

It is the universal law that no defendant has the duty of proving his innocence. The decision at bar strongly points out that petitioner should have made a tenable explanation. What is a tenable explanation? Who is to determine such a required explanation as being sufficient—legally—in defense of an accusation as the one at bar? Hence the rule, universal and logical,—that it is the duty of the government to prove by substantial evidence the guilt of the accused—not that the accused must offer some tenable explanation for his predicament. Circumstances may prevent any explanation for—hence our rule of law—proof of crime must be established beyond a reasonable doubt. In cases where circumstantial evidence is relied upon, there can be no presumptions of guilt. Presumptions

must be based upon proved facts, not another presumption, *Ribaste* v. *U. S.*, 44 Fed. (2) 21; *Dahley* v. *U. S.*, 50 Fed. (2) 37. Inferences or presumptions are not substitutes for proof of independent and material facts, *U. S.* v. *Ross*, 92 U. S. 281, 285, *U. S.* v. *Carrs* 132 U. S. 644, 653.

3. There is a conflict between the findings in the decision at bar by the Honorable Judges Learned Hand, Swan and Frank and by the Honorable Judges Augustus N. Hand, Chase, and Frank in *U. S.* v. *McCarthy and Arre*, Case No. 50, Docket No. 21744, Decided December 4th, 1950, not yet reported, on the question of incriminating statements. As to petitioner, the judges constituting the appeals court found that the exclamations by petitioner "Cannot we do something about this?" . . . he was not going to burn them, but that he was not going to pass them in New York or in Canada . . . that they had been brought in the night before by a "rat" whose name he refused to disclose because he was no stool pigeon . . . and that he had never seen any that looked any better were held to be incriminating statements (R. p. 35). In the *McCarthy and Arre* Case, the learned judges constituting the appellate court did not consider that Arre's statements to the officer's "Can we straighten this thing out . . . offer to pay a grand (means $1000.00) to one officer and take care of the others" as being sufficient to sustain the conviction.

These declarations by Arre, together with the fact of his association with McCarthy and a co-defendant Blake, in the passing of several counterfeit bills in a New York saloon, were considered inadequate and insufficient to constitute guilt, and the conviction was ordered reversed and the indictment quashed. This conflict of decisions requires the settlement by this Honorable Court of the disputed findings by the same court, and such conflicts in the same appeals court are reviewable by this Honorable Court,

John Hancock Insurance Co., v. *Bartels* 308 U. S. 180; *Dickerson* v. *Petroleum Conversion Corp.*, 338 U. S. 507.

4. The decision at bar finds that the trial court erred in its refusal to permit a government witness on cross-examination to give his impression from the declarations, attitude, conduct and demeanor of the petitioner at the time of the discovery of the counterfeit bills in his home. What petitioner said and did was all part of the *res gestae*. True, that the witness' opinion was asked by petitioner, but this opinion was essential to a fair consideration by the trial court of all of the evidence in the case. The witness was asked on cross-examination (R. 17) "Q. He gave you the impression, didn't he, that he did not know these bills were in that room? Isn't that the impression he gave you? Mr. Cohn. I object. The Court: The objections is sustained. That is a question of fact for me to decide."

The appeals court took the view that petitioner should have objected to the ruling (R. p. 37). Petitioner was cross-examining, he asked the question, he could not possibly object. Mr. Cohn, government counsel objected and was sustained. Petitioner, under the new rules is no longer required to take exceptions to the rulings of the court. What the appeals court means by the statement we can only conjecture. But, be that as it may, it was essential, pertinent and a requirement in a criminal trial, particularly, that the trial court get all of the facts. The conduct and attitude of the accused always have an important bearing on determining the truth. Certainly, anything said and done coincident with the discovery of a crime is evidential as part of the *res gestae*, Wharton's Criminal Evidence, 11th Edition, Section 492, 493; *Traveler's Insurance Co.*, v. *Moseley*, 75 U. S. 387; *Stevenson* v. *U. S.*, 29 CCA 600.

Clearly, the questions presented are of great importance in the administration of justice in the criminal courts; the conflicts between the various circuits should be finally settled by this Honorable Court and are of fundamental importance in federal criminal practice, which must be decided by the authoritative decision of this Honorable Court.

The petitioner, therefore, respectfully submits that his petition for a writ of certiorari be granted.

December 8th, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 449

JOHN MICHAEL PETRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINON BELOW

The opinion of the Court of Appeals (R. 34-37) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1950 (R. 37). The petition for a writ of certiorari was filed on December 11, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction of possessing counterfeit bills.

2. Whether the trial court's refusal to permit a Government witness on cross-examination to answer a question posed by petitioner's counsel constituted reversible error.

STATUTE INVOLVED

The pertinent statute [18 U.S.C. 472] provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT

After freely and voluntarily waiving a jury trial (R. 3-4), petitioner was convicted (R. 30) of unlawful possession of approximately 500 counterfeit ten dollar Federal Reserve Bank notes, in violation of 18 U.S.C. 472 (R. 2), and sentenced to fifteen years' imprisonment and to pay a fine of $5,000.

The Government's uncontroverted evidence may be summarized as follows:

About 8:00 a.m. on March 24, 1950, three special agents of the Federal Bureau of Investigation (R.

4, 11, 19, 24), in executing a warrant of arrest charging petitioner with receiving jewelry stolen from interstate commerce, arrested him on the first floor of his three-story home located in the Bronx, immediately after he permitted them to enter (R. 4-5, 9-11, 19, 24, 25). One of the agents, in order to permit petitioner to change to his street clothes, accompanied him to his bedroom on the third floor which, in addition, contained a bedroom where petitioner's son was sleeping and an unoccupied bedroom which contained some clothes of petitioner and his son (R. 5, 7, 11, 12, 14). While petitioner was dressing and with petitioner's consent, after the agent advised him that he could search the house as an incident to the arrest, the agent, in the presence of petitioner and his wife, searched petitioner's bedroom, the third floor hall and the unoccupied bedroom, where he observed 510 counterfeit ten dollar Federal Reserve Bank notes lying on top of a dresser (R. 5-7, 13, 14, 15-16, 20, 25).

The agent picked up the notes and asked petitioner "What is this?" Petitioner said, "I don't know what it is," but when asked if it was counterfeit, he replied affirmatively and then inquired "Cannot we do something about this?" When the agent indicated disinterest in such a proposition and requested the other two agents to come upstairs, petitioner became quite excited, indicated complete disgust that the notes were found in his

possession, commented, "Oh, I am ruined," that judging from the newspaper articles, counterfeiting was a serious offense, that "essentially" counterfeiting was not his "line," that he had never seen any counterfeit notes that looked any better, that he was sorry for bringing "this shame" upon his wife, that he was "very unhappy about getting mixed up in this" and that he was going to kill himself; and he then repeated his earlier offer to the agents to "do something about" it. (R. 8, 16-18, 20-21, 22, 23, 24, 25.) When advised that the house was searched initially for a pair of earrings, petitioner said, "My goodness, if I had the earrings I would certainly be glad to give them to you. If you only had not found this [notes]" (R. 21). One of the agents inquired as to what petitioner had planned to do with the currency. Petitioner did not answer and then when asked if he intended to burn it, he smiled at that and said "no, he did not intend to burn it, but he was not going to pass it in New York." When asked "if he was going to pass it in Canada * * * he said no. And then he made a comment about that rat bringing the stuff last night" (R. 8-9, 22, 26), whom he refused to identify, saying that he was not a stoolpigeon (R. 9). One of the agents testified that petitioner remarked that he had just brought the counterfeit notes home the previous night (R. 21).

Petitioner introduced no evidence on his behalf.

After the Government rested, he moved to dismiss the indictment and later, after the verdict, moved for a judgment of acquittal on the ground that the Government had failed to prove its case. Both motions were denied. (R. 29-32.)

ARGUMENT

1. Petitioner contends that the evidence is insufficient to sustain his conviction (Pet. 8-12). He argues that each element of the crime, principally the intent to defraud required under the statute, was not shown by "definite, positive, unequivocal evidence of some overt act or undisputed admission" (Pet. 9), but was shown only by inferences from circumstances which, he further argues, cannot be "substituted for facts" (Pet. 9). Manifestly, however, the intent element may be, and in most instances necessarily must be, established by circumstantial evidence. *Ghadiali* v. *United States,* 17 F. 2d 236, 237-238 (C.A. 9), certiorari denied, 274 U.S. 747; *United States* v. *Reginelli,* 133 F. 2d 595, 598 (C.A. 3), certiorari denied, 318 U.S. 783; *Neff* v. *United States,* 105 F. 2d 688, 691 (C.A. 8); *Aplin* v. *United States,* 41 F. 2d 495, 496 (C.A. 9). We submit that, viewing the evidence and the inferences to be drawn therefrom in the light most favorable to the Government (*Glasser* v. *United States,* 315 U.S. 60, 80), petitioner's contention is untenable.

The court below analyzed the evidence in detail (R. 34-36) and we shall not repeat that analysis

here. It is clear that the uncontroverted evidence of the circumstances where the currency here involved was found, petitioner's statements to the F.B.I. agents which evidenced his consciousness of guilt (*United States* v. *Picarelli,* 148 F. 2d 997 (C.A. 2), certiorari denied, 326 U.S. 722; *Christian* v. *United States,* 8 F. 2d 732, 733 (C.A. 5)), and the absence of an innocent explanation by him, either at the time the money was discovered or at the time of trial, all point to "no other [possible] conclusion", as the court below stated (R. 36), except guilt. Accordingly, we submit that the evidence here justified the court's finding of guilt [illegible] and no sufficient reason appears why the concurrence of the district judge [illegible] and the Court of Appeals as to the sufficiency of the evidence should not be accepted as final. *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590. None of the decisions cited by petitioner (Pet. 8-12) supports his repeated assertion of a conflict of decisions.

2. Petitioner complains (Pet. 12-13) that the trial court erred in refusing to permit one of the F.B.I. agents on cross-examination to answer the following question: "He [petitioner] gave you the impression, didn't he, that he did not know these bills were in that room? Isn't that the impression he gave you?" But, as the Court of Appeals pointed out (R. 36-37), such matters are within the discretion of the trial court. Furthermore,

the question called for a conclusion of fact and, as the court also pointed out, was therefore improper under some decisions, but with which it did not agree (R. 36) (*Lewis* v. *United States,* 11 F. 2d 745, 747 (C.A. 6)). Assuming, *arguendo,* that such a question is proper in some cases, here it called for a conclusion as to petitioner's state of mind, which obviously was not a matter within the personal knowledge of the witness of whom the question was asked and accordingly not one on which he could testify. Cf. *Robertson* v. *United States,* 171 F. 2d 345, 346 (C.A.D.C.); *Brown* v. *United States,* 152 F. 2d 138, 139 (C.A.D.C.); *Gantz* v. *United States,* 127 F. 2d 498, 504, certiorari denied, 317 U.S. 625.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 449.

JOHN MICHAEL PETRONE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF OF PETITIONER.

We respectfully submit that the necessity for replying to the government's brief in opposition to the granting of a writ of certiorari is impelled by the incorrect statement of fact on page 3, *viz:*

> "The agent picked up the notes and asked petitioner 'What is this?'. Petitioner said, 'I don't know what it is', but when asked if it was counterfeit, he replied affirmatively and then inquired 'Cannot we do something about this'."

Petitioner at no time replied affirmatively that he knew the money was counterfeit (R. page 7).

The government relies on *U. S.* vs. *Picarelli,* 148 Fed. (2) 997, 2 C. C. A. and *Christian* vs. *U. S.,* 8 Fed. (2) 722, as expounding the principle of "consciousness of guilt", from alleged admissions made by the accused.

The facts in *Picarelli* vs. *U. S., supra,* are not similar to those at bar. Picarelli, with another was charged with the unlawful possession of rationing coupons issued under the Second War Powers Act. It was conceded that the coupons were not lawfully issued to him or for anyone for whom he was acting as agent and further that they were discovered in his car. His conversation with the arresting officers "Listen, Officer, can't we talk this thing over?", coupled with his unexplained possession of the coupons, did create a question for the jury to determine his guilt or innocence. The rationing regulations prohibited the possession, use or transfer of coupons not lawfully issued to the person possessing them. An innocent explanation would be called for.

But, as to petitioner, the unlawful possession of counterfeit money is made a crime by statute only when that possession is for a fraudulent purpose. Absent proof fraudulent intent the statute is not violated. Conjecture, suspicion, surmise or supposition are not the legal bases for establishing proof of guilt, *Murphy* vs. *U. S.*, 18 Fed. (2) 509, 512 (8 C. C. A.); *Girgenti* vs. *U. S.*, 81 Fed. (2) 741 (3 C. C. A.); *De Vito* vs. *U. S.*, 68 Fed. (2) 837 (2 C. C. A.); *Farmer* vs. *U. S.*, 297 U. S. 711.

Christian vs. *U. S., supra,* has no application here. Christian offered to plead guilty to charges of violating the Prohibition Act in exchange for the imposition of fines instead of jail sentences. This was irrefutably an admission of absolute guilt. Such was not, ever, the position of petitioner.

The remarks by petitioner to the agents, his attitude, excitement and the fact that the alleged counterfeit money

was in plain open view on top of a dresser do not connote facts establishing "a consciousness of guilt." His alleged remark to the agent "Can't we do something about this" is given a sinister inference, when as a matter of fact, innocent inferences could equally and consistently be given to such a remark. Petitioner's co-operativeness in consenting to a search of his entire home, is certainly inconsistent with any "consciousness of guilt", relating to the presence of counterfeit money in his home and knowledge of its spurious quality, *or intent to defraud.*

The government's brief merely states that there are no conflicts of decisions of the various appellate courts with that at bar, but does not cite any authorities to sustain this argument. Our brief clearly points out the conflicts involved.

Conclusion.

The questions presented are of great importance in the uniform administration of justice in the criminal courts which should be finally settled and determined by this Honorable Court; and a writ of certiorari should be granted.

Respectfully submitted,

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